(2)

No. 91-860

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives,

Appellants,

vs.

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative,

Appellees.

On Appeal From the United States District Court For The District Of Montana

MOTION TO AFFIRM

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QUESTION PRESENTED

Does the standard of equal representation for equal numbers of people under Article I, section 2 of the United States Constitution, as enunciated by this Court in *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964), apply to apportionment of representatives among the several states?

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On Appeal From the United States District Court For The District Of Montana

MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the appellees move that the judgment of the United States District Court for the District of Montana be affirmed.

OPINION BELOW

The opinion of the three-judge district court is reported at 1991 WL 212525, but is not yet available in published form. It is reprinted as Appendix A to the Jurisdictional Statement filed by appellants. A memorandum opinion of the single judge addressing jurisdictional

issues is not yet reported. It is reprinted as Appendix B to the Jurisdictional Statement.

JURISDICTION

The judgment and permanent injunction were issued by the three-judge district court on October 18, 1991. A notice of appeal to this Court was filed by appellants United States Department of Commerce, Robert A. Mosbacher, Bureau of the Census and Barbara Everitt Bryant on October 24, 1991. A second notice of appeal was filed by defendant Donnald K. Anderson on November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATEMENT OF THE CASE

On May 22, 1991, appellees filed their complaint in the United States District Court for the District of Montana and simultaneously filed a motion to convene a three-judge court and a motion for preliminary injunction. In their complaint, appellees requested the court to declare unconstitutional 2 U.S.C. § 2a and to permanently enjoin the appellants from effecting the current decennial reapportionment of the House of Representatives under that section.[1]

[1] Contrary to the appellants' suggestion (J.S. at 12), appellees at no time requested the district court to order Congress to adopt the Dean method, or any other method, for the present

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Following the convening of a three-judge court, appellants moved to dismiss appellees' complaint on the grounds that it presented a nonjusticiable political question and that the appellees lacked standing to pursue their claims. Appellants also requested that the three-judge district court be dissolved.[2]

Appellants' motion to dismiss was denied by United States District Judge Charles C. Lovell on August 15, 1991, at which time the court set a hearing on the appellees' motion for preliminary injunction. Both parties filed motions for summary judgment and appellants moved for reconsideration by the three-judge court of their motion to dismiss and to dissolve the three-judge court. All motions were heard by the three-judge district court on September 3, 1991. Both parties submitted affidavits, but no testimony was presented.

On October 18, 1991, the three-judge court entered its opinion, concluding that 2 U.S.C. § 2a unconstitutionally

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apportionment. Both the Dean and Adams methods were discussed by appellees for the purpose of demonstrating to the court that use of a method other than the method of equal proportions would reduce the disparity in population between congressional districts. *See infra* at 11-12.

[2] Contrary to their position below, appellants concede in their jurisdictional statement that the three-judge district court was properly convened and therefore maintain that this Court has jurisdiction over the appeal. (J.S. at 25-28.) Appellees agree that the Court has jurisdiction to entertain the appeal and, even if the Court finds the three-judge district court was improperly convened, do not oppose the granting of appellants' petition for a writ of certiorari filed in *Department of Commerce v. Montana*, No. 91-859.

deprived appellees of equal representation as demanded by Article I, section 2, of the United States Constitution. (J.S. App. 19a.)[3] The district court concluded that "Article I, Section 2 imposes upon Congress the same duty to 'meet the standard of equal representation for equal numbers of people as nearly as is practicable,' . . . when apportioning Congressional districts that it imposes upon state legislatures." (*Id.* at 12a.) The method of equal proportions specified by law, the court held, fails to pass constitutional muster under that standard. (*Id.* at 15a.) The court entered a final judgment, declaring 2 U.S.C. § 2a unconstitutional and void and permanently enjoining the defendants and their agents from effecting reapportionment of the United States House of Representatives under the provisions of that statute. (*Id.* at 47a-48a.)

ARGUMENT

The district court correctly concluded that the "high standard of justice and common sense" established by the framers of the Constitution in Article I, section 2 imposes upon the United States Congress the requirement that apportionment of representatives among the states achieve, as nearly as is practicable, "equal representation for equal numbers of people." *Karcher v. Daggett*, 462 U.S. 725, 730 (1983). Because the method of equal proportions

[3] All three judges concluded that the three-judge district court was properly convened, that appellees had standing, and that the appellees' claims were justiciable. Circuit Judge Diarmuid F. O'Scannlain dissented from the court's holding on the merits.

specified in 2 U.S.C. § 2a does not use district population as the standard upon which apportionment is to be determined, it does not best achieve this standard. "If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand." *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964).

1(a). Sections 1 and 2 of Article I are the product of the Great Compromise reached by the delegates to the 1787 Constitutional Convention. The bicameral Congress provided for in the Constitution reflects the delegates' decision that "in *one* branch the *people*, ought to be represented; in the *other*, the *States*." 3 *The Records of the Federal Convention of 1787* 462 (Farrand ed. 1911) (quoting delegate William Samuel Johnson of Connecticut) (emphasis in original). It is clear from the debates that the delegates intended to create a national legislature in which the several states of the union would be equally represented in one body and the people of the United States equally represented in the other. As noted by George Mason of Virginia, the larger branch of Congress "was to be the grand depository of the democratic principle of the Govt." *Id.* at 48.

In its first opportunity to address the meaning of Article I, section 2 in light of the historical underpinnings of the bicameral Congress, this Court concluded that the Constitution requires "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 364 U.S. at 7-8. Reviewing the debates of the Constitutional Convention, the Court observed that central to the framers' fundamental ideas of democratic government was their design that "it was

population which was to be the basis of the House of Representatives." *Id.* at 9. Because " 'numbers of inhabitants' should always be the measure of representation in the House of Representatives," the Court affirmed in *Wesberry* that the House "was to represent the people as individuals, and on a basis of complete equality for each voter." *Id.* at 13-14. Accordingly, the Court held that it is incumbent upon the states to draw congressional districts to meet the Constitution's "plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18.

(b). Since *Wesberry*, this Court's decisions regarding apportionment of congressional districts have reaffirmed that population equality between districts is "the preeminent, if not the sole, criterion" by which the constitutionality of an apportionment is judged. *Chapman v. Meier*, 420 U.S. 1, 23 (1975). Under the "one person, one vote" standard, congressional districts must be apportioned "to achieve population equality 'as nearly as is practicable.'" *Karcher*, 462 U.S. at 730. This test requires that unless population disparities among congressional districts are shown to have resulted despite a good-faith effort to achieve precise mathematical equality, the state must justify each variance, "no matter how small." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). The Court has refused to adopt a *de minimis* standard for population variations, opining that "[a]s between two standards – equality or something less than equality – only the former reflects the aspirations of Art. I, § 2." *Karcher*, 462 U.S. at 732.

Although this Court has not had occasion to consider the application of Article I, section 2 to apportionment of

representatives by the Congress, the district court concluded that the "one person, one vote" standard applies with equal force in this situation. The district court found noteworthy this Court's observation that " 'when the delegates agreed that the House [of Representatives] should represent 'people' they intended that . . . the number [of Congressional seats] *assigned to each State* should be determined solely by the number of the State's inhabitants.' " (J.S. App. at 7a.) (quoting *Wesberry*, 376 U.S. at 13) (emphasis added).[4] In short, drawing from the constitutional debates over how seats should be apportioned to states, the court agreed with appellees' position that "there is no principled reason why the standards set forth in *Wesberry* should not apply to the apportionment of representatives by Congress, despite this mathematical impossibility." (*Id.* at 9a.)[5] The district court then held:

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[4] This passage from *Wesberry* underscores the goal of the framers, in requiring that representatives be apportioned to the states "according to their respective numbers," to establish a system of apportionment based upon actual population of each congressional district. Their intention in this regard is further evidenced by the very language of Article I, section 2, clause 3, in which the maximum ratio of one representative for every 30,000 people is established. There is no textual basis, as appellants suggest, upon which to distinguish the duties of state legislatures, as implied from clause 1, from the duties of the United States Congress, as expressed in clause 3. In either case when viewed in its historical context, the overriding purpose of Article I, section 2 is to ensure that, once the number of congressional positions is determined, they be apportioned among the States so as to guarantee, to the greatest extent possible, that all members represent equal numbers of persons.

[5] The "mathematical impossibility" referred to by the district court occurs "because Congress must adhere to existing

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> Article I, Section 2 provides no textual basis upon which to distinguish the duties of Congress from the duties of the state legislatures in this regard. Article I as a whole concerns the powers and responsibilities of the federal legislative branch, rather than state legislatures. The plain language of Article I, Section 2 specifically refers to apportionment among the several states. Clearly, any duty imposed upon state legislatures by Article I, Section 2 is also imposed upon Congress.

(*Id.*)

The district court's conclusion is well-grounded in history and in the text of the Constitution itself. Equal representation for equal numbers of people is the foundation of the House of Representatives. When distilled to its essence, the debate over Article I, section 2, elucidates the framers' intent that each member of the House be a voice in the national legislature for the same number of inhabitants. "The purpose of [Article I, section 2] is obvious: It is to make the votes of the citizens of the several States equally effective in the selection of members of Congress. It was intended to make illegal a nation-wide 'rotten borough' system as between the States." *Colegrove v. Green*, 328 U.S. 549, 570 (1946) (Black, J., dissenting). Strict standards for drawing congressional district boundaries at the state level are meaningless to the right to participate equally in elections if the same standards do not govern apportionment by Congress.

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state boundaries and each state must have at least one representative." (J.S. App. at 9a.)

2(a). The method of equal proportions, selected by Congress in 1941 as the method to be used in apportioning representatives, was not designed to, and does not, achieve the minimum difference in the *absolute* population of each congressional district. As acknowledged by appellants, the objective of the method of equal proportions (the "Hill" method) is to minimize the *relative* difference between the number of persons per representative and between each person's share of a representative. (J.S. at 10.) In other words, the Hill method minimizes the percentage difference in the ratio or proportion of representation in the House among all possible pairs of states. (Motion App. at 12.)

The method of harmonic means (the Dean method), on the other hand, is expressly designed to – and does – minimize the absolute difference between the numbers of persons per representative among all possible pairs of States. (J.S. at 9.) This method "most nearly equalizes the average population per district if the inequality is measured by the absolute difference." L.F. Schmeckebier, *Congressional Apportionment* 60 (1941). Thus,

> it is the Dean solution that minimizes the inequality between states, if inequality is measured in terms of the *absolute difference* in persons per representative. . . . This is because Dean's method finds a common divisor x . . . and an assignment of seats to each state which makes the number of persons per representative closest to x. A transfer of a seat between two States will therefore move the number of persons per representative further away from x in both States, and so will increase their absolute difference. Dean's method can

> therefore also be described as the one that makes the inequality between any two states as small as possible if inequality is measured as the absolute difference in persons per representative.

M. Balinski & H. Young, *Fair Representation: Meeting the Ideal of One Man, One Vote* 49 (1982) (emphasis in original).

Although appellants emphasize "quota" and "share in a representative" in support of their argument that Congress's decision to adopt the Hill method should be respected, these are inappropriate factors upon which to rely exclusively in conducting reapportionment in view of the meaning of the "one person, one vote" standard applied by this Court. Notwithstanding the mathematical studies commissioned by Congress or the various principles upon which each method is based, the overriding constitutional standard requires equal representation for equal numbers of people – a standard which only the Dean method (of the five "divisor" methods) uses to calculate apportionment. Notably, the equal proportions method was adopted by Congress more than 20 years before this Court's decision in *Wesberry*. Congress has not since examined reapportionment using population per district as the measure of equality.[6]

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[6] Far from a considered judgment after careful review of all the facts, it has been suggested that "political expediency had a heavier hand" in the adoption of the Hill method by Congress. M. Balinski & H. Young, *supra* at 71. "A peculiar combination of professional rivalry, scientific error, and political accident seems to have decided the issue." *Id.* at 77.

(b). Applying the method of equal proportions to the 1990 Census tabulations, the United States Department of Commerce determined that the State of Montana was entitled to receive one representative beginning in the 103rd Congress. On January 16, 1991, the Clerk of the House of Representatives transmitted to the Governor of Montana the Certificate of Entitlement, notifying the State that it was entitled to one representative. (Motion App. at 10.) This marks the first time since 1910 that Montana will have only a single representative. With a population of 803,655, Montana will become a congressional district 40 percent larger than the ideal district size of 572,466. (Motion App. at 14.)[7] Moreover, use of the equal proportions method results in an overall deviation from the ideal of 61 percent, with a disparity between the largest and the smallest district of 347,680 persons. (*Id.*)

If the Dean method were applied to the 1990 Census tabulations, Montana would receive two representatives and the State of Washington would receive eight instead of nine. (J.S. at 12.) The overall disparity between the largest and smallest districts would drop to 298,171 persons, representing a total range of 52 percent from the ideal district size. (Motion App. at 14.)

Under the Hill method, Montana's congressional district would contain 231,189 persons (40.4 percent) more

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[7] The mathematically ideal district is determined by dividing the number of members in the House (435) into the 1990 apportionment population of the United States (249,022,783). (Motion App. at 13.)

than the ideal district. Washington's districts would contain 29,361 persons fewer (5.1 percent) than the ideal district. Under the Dean method, however, Montana's districts would be 29.8 percent smaller (170,638 persons) than the ideal, whereas Washington's districts would be 6.7 percent larger (38,527 persons) than the ideal. Application of the Dean method reduces the disparity and minimizes the difference in number of persons per representative.

Using this illustration, the district court concluded that appellees had met their burden of proving that the amount of disparity in district sizes under the existing reapportionment scheme is not unavoidable. (J.S. App. at 15a.) Relying on this Court's reapportionment decisions, the district court further concluded that appellants could not justify the disparity "based on Congress' past 'considerations of practical politics.'" (*Id.* at 17a) (quoting *Kirkpatrick v. Preisler*, 394 U.S. at 533).

(c). In his dissent, Judge O'Scannlain mistakenly concluded that the appellees had failed to prove that the Dean method minimized absolute population variances. Importantly, however, the dissent recognized that the right to vote has "fundamental" status under the Constitution and, accordingly, that the court's inquiry must center on whether disparities in voting power are "unnecessary." (J.S. App. at 22a.) Judge O'Scannlain therefore agreed that the *Karcher* standard, requiring the plaintiffs to assume the initial burden of showing that population differences among districts " 'were not the result of a good faith effort to achieve equality' and could have been avoided by use of a different districting plan," was applicable. (*Id.* at 23a.)

Judge O'Scannlain nonetheless concluded that appellees had failed to sustain this burden. This conclusion was based on several erroneous assumptions. First, the dissent compared only the relative difference between Washington's districts and Montana's districts, rather than comparing both to the ideal as is required under the *Karcher* and *Wesberry* analysis. (J.S. App. at 29a.) Second, the dissent aggregated the district populations for each state to arrive at the conclusion that the Dean method did not produce more equitable results than the Hill method. (*Id.* at 29a-30a.) Thus, Judge O'Scannlain predicated his determination on *state* population, rather than on *district* population, again departing from the "one person, one vote" analysis and disregarding the historical context of a "national legislature." Finally, the dissent incorrectly assumed that mathematical variance equated with population disparity. (*Id.* at 30a.) Mathematical variance, however, as reflected in the declaration of Lawrence Ernst submitted below, the appellants' own expert, is not the same as population variance as that term has been used in the reapportionment cases. (Ernst Decl. at 13.) Appellants also have agreed that application of the Dean method results in a smaller difference in absolute district size. (*Id.* at 11.)

3. Appellants argue that, notwithstanding the fact that the disparity between population per congressional district could be reduced by application of the Dean method, the Court should not engage in such an analysis because Congress has "plenary power" to determine the appropriate method of apportionment. (J.S. at 18.) Appellants concede, however, that the determinations of Congress in this regard are not entirely unreviewable. (*Id.* at

19.) They argue that, as long as Congress has acted reasonably or rationally, the Court may not review its decision. (*Id.* at (i), 19-20.)

The appellants' position in this regard differs from that advanced before the district court. Below, they relied on each of the political-question factors identified in *Baker v. Carr*, 369 U.S. 186, 217 (1962), as grounds for finding a nonjusticiable controversy without reference to whether Congress had acted reasonably or unreasonably. In the Jurisdictional Statement, they make reference only to the first three of those factors and further concede that not "*all* matters concerning the apportionment of Representatives among the States present nonjusticiable political questions." (J.S. at 19; emphasis in original.) While the appellants' district court position was extreme and rightly rejected by the entire panel, it at least maintained fidelity with the concept underlying the political-question doctrine; i.e., there exists a class of congressional decisionmaking which, irrespective of its seeming fairness or unfairness, is outside the scope of judicial review. *See* Henkin, *Is There A "Political Question" Doctrine?*, 85 Yale L. J. 597, 599 (1976). The appellants' present, hedged posture assumes the only limitation imposed on congressional apportionment of House seats, the specific restrictions in Article I, section 2 aside, is that the apportionment be reasonably related to state population. This assumption, however, lies at the core of the parties' substantive disagreement. The appellants therefore subordinate the political-question determination to resolution of the merits and effectively, if not rhetorically, abandon the justiciability issue.

4. Since this Court's decision in *Dunn v. Blumstein*, 405 U.S. 330 (1972), it cannot be questioned that "a citizen

has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* at 336. Consequently, infringement of that protected right must be accorded strict scrutiny and must be shown by the defendants to be "'*necessary* to promote a *compelling* state interest.'" *Id.* at 337 (emphasis in original) (quoting *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 627 (1969)). "In other words, the right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process.'" *Plyler v. Doe*, 457 U.S. 202, 233 (Blackmun, J., concurring).

Instantly, the reapportionment of the United States House of Representatives has impaired the right of Montana citizens to exercise their electoral franchise on equal footing with voters in other congressional districts. Congress is not immune from scrutiny when it has transgressed constitutional restrictions and violated the fundamental voting rights of Montana citizens.[8]

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[8] Appellants make the suggestion that the district court's judgment somehow does not apply to the 103rd Congress. (J. S. at 24 n.19.) They suggest that because the certificates of entitlement have been issued to the states, nothing more remains to be done to "effect" reapportionment and therefore the judgment can have no effect until reapportionment in the year 2000. Appellants overlook several important points in making this proposition.

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First, it has long been established that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. County of Shelby*, 118 U.S. 425, 442 (1886). *See also United States v. Munoz-Flores*, 863 F.2d 654, 661 (9th Cir. 1988), *rev'd on other grounds*, 495 U.S. 385 (1990). Although this rule is tempered when rights have vested or prior determinations have become final and been acted upon accordingly, *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940), those considerations are not present here. Rights have not vested, since representatives will not be elected until November 1992. Furthermore, the reapportionment will not be complete until those representatives are elected and sworn. *See* 14 Op. Att'y Gen. 406, 408 (1874) (representative not regarded as holding office for any purpose until oath of office is taken); 2 U.S.C. §§ 25, 26 (oath of office, roll of representatives-elect).

Second, the declaratory judgment of the district court should be construed and given effect in accordance with its language. *Cf. Gonzalez v. Bowie*, 123 F.2d 387, 391-92 (1st Cir. 1941); *American Indemnity Co. v. Davis*, 260 F.2d 440, 443-44 (5th Cir. 1958). Had appellees sought no more than precedent for the next reapportionment, the federal court would have lacked jurisdiction even to consider the issue. *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 275 (7th Cir. 1988). It is unmistakably the decision of the district court that going forward with the current reapportionment based on 2 U.S.C. § 2a will violate the fundamental voting rights of appellees and of all Montana voters. The court declared section 2a "unconstitutional and void" on the basis of its finding that Montanans' constitutional rights have been violated. While the language of the final judgment may not literally provide coercive relief, the only way to give effect to the plain language of the court's findings is to void the certificates of entitlement issued in January 1991. Appellants also concede that the district court is empowered to grant additional coercive relief upon request to enforce the rights declared in its judgment. 28 U.S.C. § 2202.

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CONCLUSION

Appellees concur with appellants' request that the Court note probable jurisdiction, but request the Court to affirm the judgment of the district court.

Respectfully submitted,

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Finally, and as a practical matter, the effect of the appellants' argument is that appellees waited too long to bring this action by not instituting it prior to the issuance of the certificates of entitlement. This contention proves too much and illuminates one of the difficulties with 2 U.S.C. § 2a. Because the statute provides no opportunity for judicial review, appellees were required to seek a declaratory judgment, invoking the district court's federal question jurisdiction. Had the suit been filed prior to issuance of the certificate of entitlement, appellees could have alleged no specific injury and would have risked certain dismissal for lack of standing. Yet, by filing the case after the certificates were issued, appellees are subjected to the argument that they delayed improperly. If appellants' view were credited, there would never be an opportunity for the appellees to seek redress.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative, Plaintiffs, -v- UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives, Defendants.	)	Cause No. CV-91-22-H-CCL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Filed May 22, 1991)

COME NOW the Plaintiffs, by and through their counsel the Attorney General of the State of Montana, and for their complaint against the Defendants allege as follows:

JURISDICTION AND VENUE

1. This action arises under Article I, section 2 of the United States Constitution, and under the laws of the United States pertaining to the apportionment of representatives in the United States House of Representatives, 2 U.S.C. § 2a and 13 U.S.C. § 141.

2. The court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343. Declaratory and injunctive relief may be granted by this court as authorized by 28 U.S.C. §§ 2201 and 2202.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(4), since all plaintiffs reside in the District of Montana.

4. A three-judge court is appropriate to hear and determine this action pursuant to 28 U.S.C. § 2284(a).

PARTIES

5. Plaintiff State of Montana is a sovereign state of the United States. The State is entitled to a number of Representatives in Congress pursuant to Article I, Section 2, Clause 3 of the Constitution, as amended by section 2 of the Fourteenth Amendment, apportioned according to the number of people within the State. The State has received official notice that the number of representatives to which it is entitled in the United States House of Representatives will be reduced from two to one, thereby

also reducing Montana's Electoral College votes in future presidential elections.

6. Plaintiff Stan Stephens is the Governor and chief executive officer of the State of Montana, and is a qualified and registered voter in the state of Montana.

7. Plaintiff Marc Racicot is the Attorney General and chief legal officer of the State of Montana, and is a qualified and registered voter in the state of Montana.

8. Plaintiff Mike Cooney is the Secretary of State and chief elections officer of the State of Montana, and is a qualified and registered voter in the state of Montana.

9. Plaintiffs Stephens, Racicot and Cooney are charged with upholding the election laws of Montana and with protecting the voting rights of Montana citizens under the laws and constitutions of the State of Montana and the United States, and bring this claim on behalf of all voters of the state of Montana.

10. Plaintiffs Max Baucus and Conrad Burns are United States Senators for the State of Montana, and are qualified and registered voters in the State of Montana.

11. Plaintiffs Pat Williams and Ron Marlenee are United States Representatives for the State of Montana, and are qualified and registered voters in the State of Montana.

12. Defendant United States Department of Commerce is an executive agency of the United States Government.

13. Defendant Robert A. Mosbacher is the Secretary of the United States Department of Commerce and is

responsible, pursuant to 13 U.S.C. § 141, for taking a decennial census of the population and for reporting the results of the census and the calculated reapportionment to the President of the United States.

14. Defendent [sic] Bureau of the Census is an agency within the United States Department of Commerce, and has been delegated the duty of conducting the decennial census of the population of the United States.

15. Defendant Barbara Everett Bryant is the Director of the Bureau of the Census and is responsible for the taking of the decennial census.

16. George Herbert Walker Bush is the President of the United States and, pursuant to 2 U.S.C. § 2a(a), is responsible for transmitting to the Congress a statement showing the whole number of persons in each state, as ascertained under the decennial census of the population, and the number of representatives to which each state is entitled under the apportionment calculated by the Department of Commerce.

17. Defendant Donnald K. Anderson is the Clerk of the United States House of Representatives and, pursuant to 2 U.S.C. § 2a(b), is responsible for notifying each state of the number of representatives in Congress to which it is entitled in accordance with the statement transmitted by the President. Pursuant to that authority, Defendant Anderson has issued a Certificate of Entitlement to the State of Montana that it is entitled to one (1) representative in the United States House of Representatives. (Attachment A.)

FIRST CLAIM FOR RELIEF

18. Article I, section 2 of the United States Constitution, as amended by section 2 of the Fourteenth Amendment, requires that "[r]epresentatives [in the United States House of Representatives] shall be apportioned among the several States . . . according to their respective Numbers." This section requires equal representation for equal numbers of people, and imposes a standard of "one person, one vote" in determining apportionment among the states.

19. The standard of equal representation for equal numbers of people requires use of a method of apportionment which results in the least amount of disparity in district size. The present method required by 2 U.S.C. § 2, known as the "Hill method" or "method of equal proportions," does not achieve the greatest possible equality in the number of individuals per representative, and use of that method has caused the impending loss of one congressional seat to the State of Montana.

20. The 1990 population of the United States, as determined by the Bureau of the Census, is 249,632,692. The apportionment population is 249,022,783. Based on a House size of 435 members, the ideal district size is 572,466 persons.

21. The 1990 apportionment population of Montana, as determined by the Bureau of the Census, is 803,655. As a single representative district, Montana will be the largest single district represented in the United States House of Representatives, and its district size will be more than 40 percent larger than the ideal district.

22. The disparity in district size diminishes the voting power of the named plaintiffs and of all other qualified and registered voters of the state of Montana, and violates the standard, guaranteed by Article I, section 2 of the United States Constitution, of equal representation for equal numbers of people.

SECOND CLAIM FOR RELIEF

23. Plaintiffs reallege paragraphs 18 through 22, and incorporate the same by reference as though fully set forth herein.

24. From 1790 until 1911, each reapportionment of the House of Representatives was effected after consideration and determination by Congress. In 1911, the Sixty-second United States Congress enacted a reapportionment act which set the size of the House of Representatives at 433 members, with the proviso that if Arizona and New Mexico became states before apportionment under the next decennial census, each would be entitled to one representative in addition to that fixed number. The size of the House has not changed since the two seats given to the states of Arizona and New Mexico brought the total membership to 435.

25. Section 2a of Title 2, United States Code, provides for a process by which the Bureau of the Census applies a mathematical formula to the total apportionment population to determine the number of representatives to which each state shall be entitled until the next decennial reapportionment, based upon a fixed House size of 435 members.

26. Plaintiffs Baucus, Burns, Williams, and Marlenee, as members of the Congress of the United States, have the right to participate and vote on legislation in a manner defined by the Constitution.

27. The statutory scheme by which reapportionment is determined provides for no consideration or determination by Congress of the apportionment of the House of Representatives.

28. This "automatic" method for determining apportionment violates the requirement of Article I, section 2 of the United States Constitution that Congress make every good faith effort to determine the apportionment of the House of Representatives according to the whole numbers of people in the respective states to achieve, as near as is possible, equal representation for equal numbers of people and, as applied to the 1990 Census, has deprived the named plaintiffs and all Montana voters of their right to equal representation.

29. By effecting reapportionment of the House of Representatives through application of a mathematical formula by the Department of Commerce and the automatic transmittal of the results to the states with no opportunity for review by Congress, section 2a of Title 2, United States Code, has deprived plaintiffs Baucus, Burns, Williams, and Marlenee of their right to vote on the 1991 reapportionment of the House of Representatives, and violates their right to have all laws made in the manner prescribed under the general lawmaking provisions of Article I, section 7 of the United States Constitution.

WHEREFORE, having set forth herein their claims against the defendants, plaintiffs pray for relief as follows:

1. That a three-judge court be convened to hear this action.

2. That the court declare section 2a of Title 2, United States Code, unconstitutional.

3. That the defendants be preliminarily and permanently enjoined from effecting reapportionment of the House of Representatives under the provisions of section 2a of Title 2, United States Code.

4. That the court award plaintiffs such further relief as it deems just and proper under the circumstances.

Respectfully submitted this 22nd day of May, 1991.

/s/ Marc Racicot
MARC RACICOT
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401

/s/ Clay R. Smith
CLAY R. SMITH
Solicitor

/s/ Elizabeth S. Baker
ELIZABETH S. BAKER
Assistant Attorney General

Donnald K. Anderson
Clerk

Dallas L. Dendy, Jr.
Assistant to the Clerk.

OFFICE OF THE CLERK
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515-6601

January 16, 1991

Honorable Stan Stephens
Governor
State Capitol
Helena, Montana 59620

Dear Governor Stephens:

Pursuant to the provisions of Section 2a(b) of Title 2 of the United States Code, I am hereby transmitting you a certificate stating the number of Representatives to which your state is entitled in the United States House of Representatives.

Because of pending litigation with respect to the current census I am also notifying you that population counts which form the basis of the number of Representatives set forth herein are subject to possible correction for undercount or overcount. The Department of Commerce is considering whether to correct counts and will publish corrected counts, if any, not later than July 15, 1991.

Sincerely yours,

/s/ Donnald K. Anderson
DONNALD K. ANDERSON,
Clerk
U.S. House of Representatives

ATTACHMENT A - PAGE 1

Certificate of Entitlement

SEAL

HOUSE OF REPRESENTATIVES
OFFICE OF THE CLERK
WASHINGTON, D.C.

I, Donnald K. Anderson, Clerk of the House of Representatives of the United States, Hereby Certify, Pursuant to the Provisions of Title 2, United States Code, Section 2a (b), That the State of

MONTANA

Shall be Entitled, in the One Hundred Third Congress and in Each Congress Thereafter Until a Subsequent Reapportionment Shall Take Effect Under Applicable Statute, to

ONE REPRESENTATIVE

in the House of Representatives of the Congress of the United States.

SEAL *In Witness Whereof I hereto Affix My Name and the Seal of the House of Representatives of the United States of America this Sixteenth Day of January, Anno Domini 1991, in the City of Washington, District of Columbia*

/s/ Donnald K. Anderson
CLERK OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES

ATTACHMENT A – PAGE 2

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

THE STATE OF MONTANA; STAN STEPHENS, Governor of the State of Montana; MARC RACICOT, Attorney General for the State of Montana; MIKE COONEY, Secretary of State for the State of Montana; MAX BAUCUS, United States Senator; CONRAD BURNS, United States Senator; PAT WILLIAMS, United States Representative; and RON MARLENEE, United States Representative, Plaintiffs, -v- UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, Secretary of the United States Department of Commerce; BUREAU OF THE CENSUS; BARBARA EVERITT BRYANT, Director of the Bureau of the Census; and DONNALD K. ANDERSON, Clerk of the United States House of Representatives, Defendants.	) Cause No.) CV-91-22-H-CCL	AFFIDAVIT OF KENNETH J. TIAHRT (Filed May 22, 1991)

STATE OF MONTANA)
: ss
County of Gallatin)

Kenneth J. Tiahrt, being first duly sworn, upon his oath deposes and says:

1. I am head of the Department of Mathematical Sciences at Montana State University and have the qualifications set forth in my *curriculum vitae*, a copy of which is appended hereto as Exhibit A.

2. In connection with this litigation, I have reviewed the data compiled by the United States Bureau of the Census for the 1990 population of the United States and also have reviewed the Bureau's calculations for the resulting reapportionment of the United States House of Representatives under the method of equal proportions (the "Hill" method).

3. I have also reviewed the calculations prepared by the Montana Department of Justice for reapportionment of a 435-member House of Representatives using the Hill method, the Dean method and the Adams method.

4. The Hill method is based upon the following principle: Given a specific membership size of the House of Representatives to be apportioned, each state should have a number of seats so that no transfer of any one seat can reduce the *percentage* difference in representation between those states. The objective of the Hill method is to minimize the percentage difference in the ratio or proportion of representation in the House among all possible pairs of States.

5. The Dean method is based upon the following principle: Given a specific membership size of the House of Representatives to be apportioned, find a divisor x so that the whole numbers which make the average constituencies of the states closest to x add up to the required total, and give to each state its whole number. This is equivalent to giving to each state a number of seats so that no transfer of any one seat can reduce the absolute difference in representation between those states. The objective of the Dean method is to apportion the seats in the House of Representatives to result in the smallest absolute difference between number of persons per representative. The Dean method is also known as the method of harmonic means.

6. The Adams method is based upon the following principle: Given a specific membership size of the House of Representatives to be apportioned, find a divisor x so that the smallest whole numbers containing the quotient of the states add up to the required total, and give to each state its whole number. The objective of the Adams method is to assign representation to the states that will result in the smallest absolute "representation surplus." The Adams method is also known as the method of smallest divisors.

7. Based upon a 1990 apportionment population of 249,022,783, and a House of Representatives size of 435 members, the mathematically ideal district would consist of 572,466 persons.

8. Using the Hill method, apportionment of a 435-member House of Representatives based upon the 1990 census figures presently available results in the smallest

district being the State of Wyoming, with a population of 455,975, and the largest district being the State of Montana, with a population of 803,655.

9. Using the Dean method, apportionment of a 435-member House of Representatives based upon the 1990 census figures presently available results in the smallest district being in the State of Montana, with a population per district of 401,827, and the largest district being the State of South Dakota, with a population of 699,999.

10. Using the Adams method, apportionment of a 435-member House of Representatives based upon the 1990 census figures presently available results in the smallest district being in the State of North Dakota, with a population per district of 320,682, and the largest district being in the State of North Carolina, with a population per district of 605,239.

11. Using the Hill method, there is a disparity between the largest and the smallest district of 347,680 persons, giving a range or dispersion amounting to 61% of the ideal district size of 572,466 persons. Under this method, Montana's single district is 40% larger than the ideal district size. Using the Dean method, there is a disparity between the largest and smallest districts of 298,171 persons, giving a range or dispersion amounting to 52% of the ideal district size. Using the Adams method, there is a disparity between the largest and the smallest district of 284,557 persons, giving a range or dispersion amounting to 50% of the ideal district size.

12. As illustrated by the box-whisker graph attached hereto as Exhibit B, the Hill method results in a

larger range or disparity between district sizes than either the Dean method or the Adams method.

13. Of the three methods examined, the Dean method produces the smallest variance or standard deviation. The Adams method, though it produces the smallest range, results in a larger standard deviation because it results in a greater number of districts that are far from the actual mean. This is not a violation of the principle of representative districts that are as close as possible in constituency size.

14. It is my opinion that the objective of having an equal number of individuals represented by one member of Congress is best served by a method under which the size of each district most closely approximates the ideal district size. Given the resulting disparity in district sizes, the Hill method does not meet this objective. The Dean method best accomplishes the goal of creating districts closest to the ideal district size, while the Adams method results in the least amount of disparity in overall range between the largest and the smallest districts.

Dated this 18 day of May, 1991.

/s/ K. J. Tiahrt
KENNETH J. TIAHRT

Subscribed and sworn to before me this 18th day of May, 1991.

(SEAL)

/s/ Linda S. Paulsen
Notary Public
State of Montana
Residing at Helena
My Commission expires
4-22-92

Montana State University Faculty Vita
Department of Mathematical Sciences

Kenneth J. Tiahrt
Professor of Statistics
Head, Department of Mathematical Sciences
Director, Statistical Center

EDUCATION: Ph. D., Mathematics/Statistics, Oklahoma State University, 1967.
M.S., Mathematics, Kansas State University, 1959.
B.S., Mathematics/Physics, Augustana (South Dakota), 1957.

EXPERIENCE:

1976- Professor, Department of Mathematical Sciences, Montana State University, Bozeman, Montana.

1970-1976 Associate Professor, Department of Mathematical Sciences, Montana State University, Bozeman, Montana.

1967-1970 Assistant Professor, Department of Mathematical Sciences, Montana State University, Bozeman, Montana.

1964-1967 Graduate Assistant, Oklahoma State University.

1959-1964 Assistant Professor, Dana College (Nebraska).

1957-1959 Graduate Assistant, Kansas State University.

PH.D. THESES DIRECTED:

Dennis Brady, "Elimination of Continuous Variates Used in Classification and Discrimination when Both Binary and Continuous Variables are Present," 1976.

Charles Shaffer, "Estimation of Commutative Totals, 1976.

James Hansen, "One at a Time Plans for 2^p Factor Sequencing Designs," 1974.

Reider Peterson, "Ratio Estimation in Randomized Response Designs," 1974.

Roy Byrd, "A Multivariate Runs Statistics," 1970.

Richard Schwaller, "A Method of Constrained Randomization for $P_1^{n_1} \cdots P_k^{n_k}$ factorials, 1970

REFERRED PUBLICATIONS:

"A method of constrained randomization for $P_1^{n_1} P_2^{n_2} \cdots P_k^{n_k}$ factorials," *Annals of Statistics*, Vol. 3, 1975.

"Importance of timing spore concentrations and spore levels in applications of Nosema Locustae for control of grasshoppers," *Journal of Invertabrate Pathology*, Vol. 21, 1973.

"Randomization for 2^{n-p} factorials in sequential experiments," *Journal of Qual. Technology*, Vol. 3, 1971.

"A method of constrained randomization for 2^n factorials, *Technometrics*, Vol. 12, 1970.

TEACHING AWARDS AND HONORS:

NSF Science Faculty Fellowship, 1964-1966.

PUBLIC SERVICE:

American Statistical Association Committee on Prizes and Awards, 1985-1986.

American Statistical Association Building & Development Committee, 1982-1983.

Chairman, Council, American Statistical Association, 1982 (Vice-Chair, 1981).

Constitution Committee, American Statistical Association, 1980.

Lecturer, American Statistical Association Visiting Lecturer Program, 1976-.

Various statistical consultation projects with such state agencies as: Highway Safety, Board of Crime Control, Maternal and Child Health, Superintendent of Public Instruction, Fish Wildlife and Parks, Post Secondary Review Commission, and various city and county government study commissions.

PROFESSIONAL MEMBERSHIPS:

American Statistical Association
Montana Chapter, American Statistical Association (organizing officer)

Pi Mu Epsilon
Mathematics Association of America

RESEARCH PROJECTS:

(S – Sponsored, U – Unsponsored)

S Bozeman Transportation Study Commission, Public Transit Survey, $944.

S Trout Unlimited, Angler Satisfaction Survey, $7,508.

S Traffic Enforcement, Equipment and Training Needs, Montana Police and Sheriffs Offices Survey. Sponsoring agency: Montana Traffic Safety Office, $2,000.

S Selective Maintenance Evaluation Design. Sponsoring agency: Montana Highway Traffic Safety Office, $30,664.

S Survey of Montana Medical Doctors. Sponsoring agency: Department of Health, $600.00.

S Analysis of Motor Vehicle Crash Data. Sponsoring agency: Montana Highway Traffic Safety Office, $25,000.00.

S Montana Futures Study. Sponsoring agency: Governor's Office of Budget and Programming Planning, $18,000.00.

S Demonstration Motor Vehicle Inspection Project in Lewis and Clark County. Sponsoring agency:

Montana Highway Traffic Safety Office, $25,000.00.

S Design of Motor Vehicle Inspection Program. Sponsoring agency: Montana Highway Traffic Safety Office, $3,200.00.

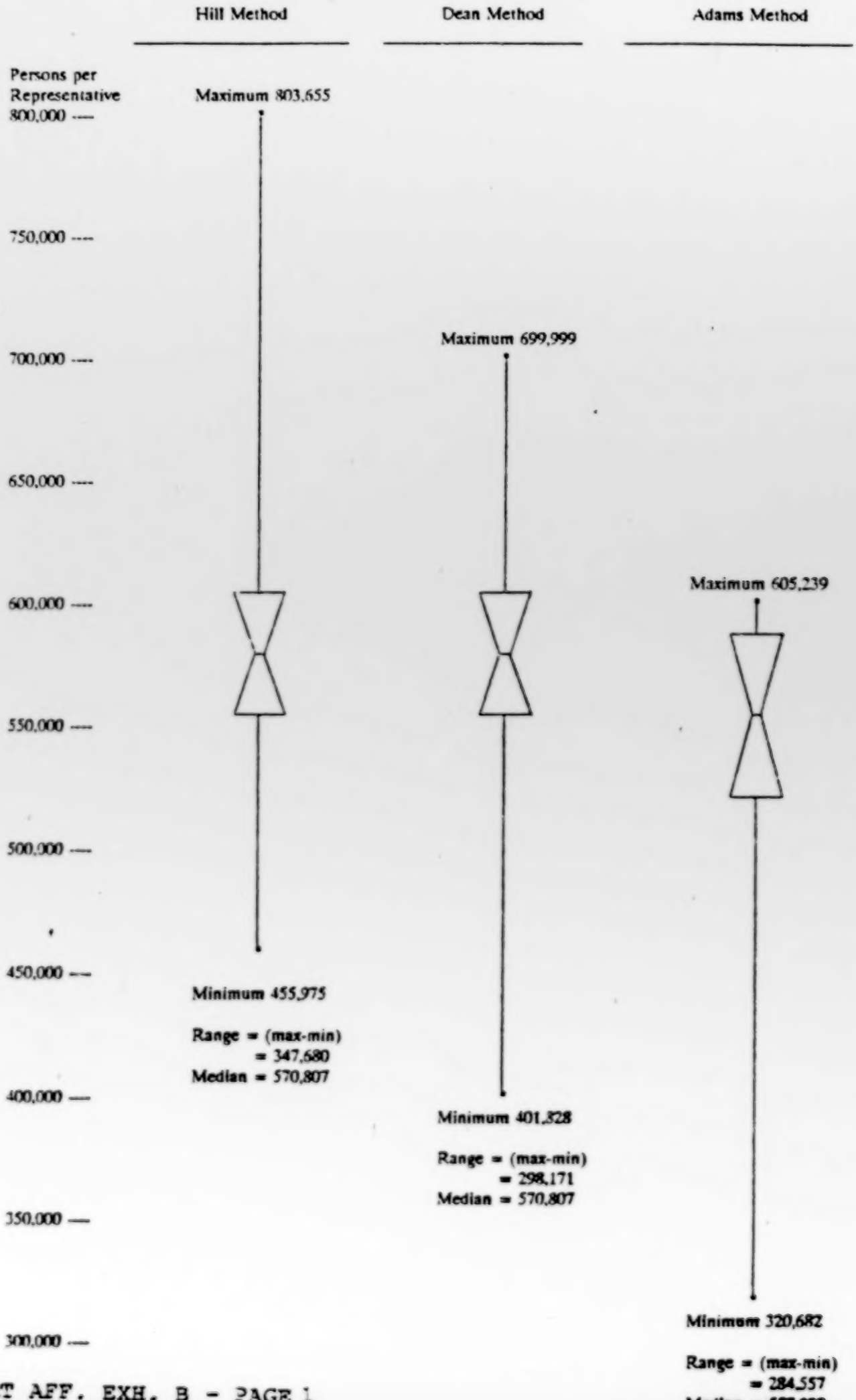
S Statistical Analysis of Fisheries Creel Census Data. Sponsoring agency: Montana Fisheries Division, $3,000.00.

S Constrained Randomization Designs. Sponsoring agency: NSF, $11,600.00.

1/2/85

Exhibit B

Comparison of the Hill, Dean and Adams methods of apportionment based on 1990 census data. The three graphs show the range of the number of persons per representative. The hourglass box in each graph gives the middle 50% of the states and the whiskers indicate the spread of the 25% on each extreme.



TIAHRT AFF. EXH. B - PAGE 1